UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 05-95809-JB
	)	
CURTIS L. STUART@UCC1-207,	)	CHAPTER 11
	)	
Debtor	)	
	)	
	)	
FELICIA S. TURNER, UNITED STATES TRUSTEE,	)	
	)	
Movant	)	
	)	
v.	)	
	)	
CURTIS L. STUART@UCC1-207,	)	
	)	
Respondent.	)	
	)	
CURTIS STUART@UCC1-207,	)	CASE NO. 05-96715-JB
	)	
Debtor	)	CHAPTER 11
	)	
	)	
FELICIA S. TURNER, UNITED STATES TRUSTEE,	)	
	)	
Movant	)	
	)	
v.	)	
	)	
CURTIS L. STUART@UCC1-207,	)	
	)	
Respondent	)	

O R D E R

The two above-styled cases came before the Court on December 1, 2005, on motions filed by the United States Trustee to dismiss each of these cases with prejudice. This

is a core proceeding within the meaning of 28 U.S.C. § 157(2)(A). Debtor filed Case No. 05-95809 *pro se* on September 6, 2005, and debtor filed Case No. 05-96715 *pro se* on October 3, 2005. These cases, filed one month apart, are the debtor's third and fourth bankruptcy cases filed since October 5, 2004. The procedural history of debtor's first and second cases, filed respectively on October 5, 2004 and February 1, 2005, is set out fully on pages 3 and 4 of the Court's Order entered on October 31, 2005 in debtor's third case, Case No. 05-95809.

The United States Trustee filed a motion to dismiss debtor's third case with prejudice on October 21, 2005, and the Court entered an Order and Notice on November 3, 2005, setting a hearing on the motion for December 1, 2005, at 9:30 a.m. The United States Trustee filed a motion to dismiss the debtor's fourth case with prejudice on October 4, 2005, and the Court entered an Order and Notice on October 31, 2005, setting a hearing on that motion for December 1, 2005, at 9:30 a.m. At the December 1, 2005 hearing, attorney Thomas Dworshak appeared on behalf of the United States Trustee. The debtor appeared *pro se*, Sidney Gelernter of the firm McCurdy & Candler, LLC, appeared on behalf of Washington Mutual Bank, F.A. ("Washington Mutual"), and Stanley Kreimer, Jr., from the firm of Perrie & Cole, appeared as counsel for Amy James. Ms. James was a third party bidder at a foreclosure sale conducted by Washington Mutual on September 6, 2005.

Counsel for the United States Trustee argued that debtor's lack of good faith is evidenced by his failure to appear at the initial debtor interview in either of these cases and his failure to appear at the § 341 meeting of creditors in either of these cases. Counsel for Washington Mutual argued that the automatic stay should be annulled so as to validate a foreclosure sale conducted by Washington Mutual on September 6, 2005, approximately 1.5

hours after debtor filed the third case. The foreclosure involved real property at 1906 Glen Echo Drive, Decatur, Georgia (the "Property"). As noted above, Amy James was the third party bidder at the sale. Washington Mutual argued that debtor was substantially in default and that the Court should annul the automatic stay so that Washington Mutual can complete the sale to Ms. James. However, counsel for Ms. James argued that these cases should be dismissed with prejudice, but that the automatic stay in the third case should not be annulled, as Ms. James did not wish to proceed with the foreclosure sale.

Mr. Stuart appeared *pro se* and did not provide any explanation for his failure to appear at the first meeting of creditors or for his failure to appear at the initial interview required by the United States Trustee in either of these cases. Debtor argued that the United States Trustee has no standing to bring a motion to dismiss, as the United States Trustee was not "elected" by the creditors. A few days after the December 1, 2005 hearing, debtor filed a pleading in his third case, Case No. 05-95809, titled "Motion for Leave to File the Statment [sic] that was read by said respondent December 1, 2005 at hearing." After carefully considering the arguments of the parties, the record and the applicable law, the Court concludes that the motions to dismiss with prejudice should be granted.

I. The United States Trustee's Standing

Debtor's arguments that the United States Trustee should not be allowed to appear or file motions to dismiss these Chapter 11 cases because she has not been elected and represents no complaining party reflects a misunderstanding of bankruptcy law. Debtor also confuses the United States Trustee with what are typically referred to as case trustees.

The moving party in the instant motions to dismiss is Felicia S. Turner, the United States Trustee for Region 21 (the "United States Trustee"), the Region serving the judicial districts in the State of Georgia. 28 U.S.C. § 581(a)(21). United States Trustees are appointed by the Attorney General of the United States; they are not elected. 28 U.S.C. § 581(a) and (b). Counsel for the United States Trustee, Mr. Dworschak, properly appeared on Ms. Turner's behalf at the December 1, 2005 hearing.

Both the statutory law and the case law are clear that the United States Trustee has standing to appear and file motions such as the motion to dismiss filed in this case. Section 307 of the Bankruptcy Code provides as follows:

> The United States trustee may raise and may appear and be heard on <u>any issue in any case or proceeding under this title</u> but may not file a plan pursuant to Section 1121(c) of this title. (Emphasis added)

Construing § 307, the courts have repeatedly held that the United States Trustee has standing to appear and be heard on any issue in any case and that a lack of pecuniary interest in the outcome of a bankruptcy proceeding does not deny the United States Trustee's standing. *United Artists Theater Co. v. Walton*, 315 F.3d 217, 225 (3rd Cir. 2003); *Stanley v. McCormick, Barstow, et al (In re Donovan Corp.)*, 215 F.3d 929 (9th Cir. 2000); *U.S. Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294 (3rd Cir. 1994); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498 (6th Cir. 1990). The Courts recognize that the United States Trustee represents a public interest, and the legislative history of § 307 demonstrates Congressional intent to broaden the standing and powers of the United States Trustees to permit them to take an active role in the administration of bankruptcy cases. *See Hayes & Son Body Shop, Inc. v. U. S. Trustee,* 124 B.R. 66, 68 (W.D. Tenn. 1991) and *In re Nieves*, 246 B.R. 866,

870 (Bankr. E.D. Wis. 2000) ("The Code provides the U.S. Trustee with great latitude as to its degree of involvement in bankruptcy cases.") The requirements in the Federal Rules of Bankruptcy Procedure that a great number of notices and pleadings be sent to the United States Trustee further confirm the proposition that United States Trustees are to be involved and heard in bankruptcy cases on a wide variety of issues. *See* Fed. R. Bankr. Proc. 2002(k) and Rule 9034.

In addition to § 307 which confers general standing on the United States Trustee, § 1112(b) of the Bankruptcy Code specifically provides for the filing of a motion to dismiss a Chapter 11 case by the United States Trustee. One of the primary grounds for the motions to dismiss filed by the United States Trustee in the instant cases is that the debtor failed to attend the meeting of creditors as required under 11 U.S.C. § 341. Section 341 specifically calls for the United States Trustee to convene and preside at a meeting of creditors. Thus, it is common for the United States Trustee to file a motion to dismiss under § 1112(b) based on debtor's failure to appear at a § 341 meeting of creditors. Section 343 of the Bankruptcy Code states as follows:

> The debtor shall appear and submit to examination under oath at the meeting of creditors under Section 341(a) of this title. Creditors, any indenture trustee, any trustee or examiner in the case, or the United States Trustee may examine the debtor. The United States Trustee may administer the oath required under this section.

Thus, the United States Trustee unquestionably had standing to file the motions to dismiss these cases for cause including debtor's failure to comply with his obligations under § 343 of the Bankruptcy Code. Debtor's arguments to the contrary are without merit.

It appears that the debtor has confused the United States Trustee with what are typically referred to as "case trustees." In Chapter 7 cases, which are liquidation cases, the

United States Trustee appoints an interim trustee from a panel of private Chapter 7 case trustees. Creditors may then elect a different Chapter 7 trustee at the first meeting of creditors pursuant to the provisions of 11 U.S.C. § 702. If a trustee is not elected under § 702, then the interim trustee serves as the trustee. In Chapter 13 cases, Standing Chapter 13 Trustees have responsibility for administering the case, and they are appointed by the United States Trustee. There are four such Standing Trustees in this district. But in Chapter 11 cases, in stark contrast to cases filed under Chapter 7 or Chapter 13, there is no automatic appointment of a case trustee, interim or otherwise. Case trustees in a Chapter 11 case, when appointed, are appointed upon motion made under 11 U.S.C. § 1104. If the Court orders the appointment of a trustee in a Chapter 11 case, the actual appointment is made by the United States Trustee. In the vast majority of Chapter 11 cases filed, there is no specially appointed Chapter 11 case trustee pursuant to § 1104, and it is the United States Trustee who has the responsibility for protecting the public interest and calling any deficiencies to the attention of the Court for proper disposition.

II. The Motions to Dismiss

Section 1112(b) provides for the filing of a motion to dismiss "for cause" by the United States Trustee or any party in interest. The Eleventh Circuit has held repeatedly that a Chapter 11 debtor's lack of good faith can constitute cause under § 1112(b) for dismissing a case. *In re State Street Houses, Inc.,* 356 F.3d 1345 (11th Cir. 2004); *In re Phoenix Piccadilly, Ltd.,* 849 F.2d 1393 (11th Cir. 1988); *In re Albany Partners, Ltd.,* 749 F.2d 670 (11th Cir. 1984). While § 1112(b) lists examples of what constitutes "cause," this list is not exhaustive, a point emphasized by the pertinent legislative history which states, "[t]he court will be able to consider

other factors as they arise, and use its equitable powers to reach an appropriate result in individual cases." *Albany Partners,* 749 F.2d at 674 (*citing* H.R.Rep. No. 595, 95 Cong., 1st Sess. 406 (1977), U.S. Code Cong. & Admin. News 1978, 5787, 6362). The Eleventh Circuit has made it clear that the "cause" requirement of § 1112(b) extends to cases where a debtor has filed a bankruptcy petition in bad faith. *Phoenix Piccadilly,* 849 F.2d at 1394 ("A case under Chapter 11 may be dismissed for cause pursuant to section 1112 of the Bankruptcy Code if the petition was not filed in good faith.") (citations omitted).

A determination of bad faith is a question of fact and must be made on a case-by-case basis. *In re SB Properties, Inc.,* 185 B.R. 198, 204 (E.D. Pa. 1995). There is no particular test for determining whether a case was filed or is proceeding in bad faith, but courts have considered the following factors:

(1) Whether the debtor has few or no unsecured creditors;

(2) Whether there has been a previous bankruptcy petition by the debtor or a related entity;

(3) Whether the pre-petition conduct of the debtor has been improper;

(4) Whether the petition effectively allows the debtor to evade court orders;

(5) Whether there are few debts to non-moving creditors;

(6) Whether the petition was filed on the eve of foreclosure;

(7) Whether the foreclosed property is the sole or major asset of the debtor;

(8) Whether the debtor has no ongoing business or employees;

(9) Whether there is no possibility of reorganization;

(10) Whether the debtor's income is sufficient to operate;

(11) Whether there was no pressure from non-moving creditors;

(12) Whether reorganization essentially involves the resolution of a two-party dispute;

(13) Whether a corporate debtor was formed and received title to its major assets immediately before the petition; and

(14) Whether the debtor filed solely to create the automatic stay.

SB Properties,, 185 B.R. at 198; *In re Northwest Place, Ld.,* 108 B.R. 809, 814 (N.D. Ga. 1988); *In re Grieshop,* 63 B.R. 657, 662-63 (N.D. Ind. 1986); *In re Gil Elisade,* 172 B.R. 996, 1000 (Bankr. M.D. Fla. 1994). This list is not exclusive, and "courts may consider any factors which evidence 'an intent to abuse the judicial process and the purposes of the reorganization provisions' or, in particular, factors which evidence that the petition was filed 'to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.'" *Phoenix Piccadilly,* 849 F.2d at 1394 (*citing Albany Partners,* 749 F.2d at 674).

The information supplied in the debtor's schedules and statement of financial affairs demonstrate that this is not a viable Chapter 11 reorganization case and that no bankruptcy purpose would be served by allowing debtor to proceed. Debtor does not list any unsecured creditors, priority or non-priority, and shows "none" for occupation or employer. The only secured creditor listed, other than the debtor, is a disputed claim with Washington Mutual, regarding real property located at 1906 Glen Echo Drive, in Decatur, Georgia. In Schedule I, Debtor lists no income, wages, salary or commission from employment or from the operation of a business, but lists "gifts/fringe benefits" of $1,600.00 a month. He describes his marital status as "married"and lists as his dependents and spouse "the United States of America."

He lists a lawsuit against Washington Mutual for fraud, unlawful conversion and violation of the "FDCPA," but states that the case was closed without prejudice. These schedules raise a number of questions, and yet the debtor did not appear at either § 341 meeting of creditors, nor did he appear at the initial debtor interviews scheduled by the United States Trustee.

The totality of the circumstances support the conclusion that these third and fourth Chapter 11 cases were not filed in good faith. Debtor has no unsecured creditors and the only active creditor, Washington Mutual, holds a security interest in debtor's real property. It appears to the Court that both cases were filed for the sole purpose of invoking the automatic stay; debtor's third case, Case No. 05-95809, was filed on the day of Washington Mutual's scheduled foreclosure and the petition in debtor's fourth case, Case No. 05-96715, was filed on the day of a hearing in the third case on Washington Mutual's motion to annul the automatic stay. These Chapter 11 cases involve a two-party dispute between the debtor and Washington Mutual. Since the debtor does not acknowledge owing any debt to Washington Mutual, the economic reality is that there is nothing to reorganize under Chapter 11. This two-party dispute should be adjudicated in state court or some other non-bankruptcy forum.

Finally, Washington Mutual had filed a motion to annul the automatic stay in Case No. 05-95809 so that it could complete the foreclosure sale to the third-party bidder. Stan Kreimer appeared on behalf of the third-party bidder, Ms. James, at the December 1, 2005 hearing. Mr. Kreimer argued that Ms. James was unaware of the bankruptcy filing at the September, 2005 foreclosure sale and that she has had a dispute with Washington Mutual since she tendered the purchase price of $94,700.00 and Washington Mutual was not able to deliver the deed under power of sale. Mr. Kreimer announced that Ms. James had requested a return of the purchase

price from Washington Mutual; she contends that this dispute is a dispute between the debtor and Washington Mutual and she is not prepared to go forward with the sale from the foreclosure that took place shortly after the bankruptcy Case No. 05-95809 was filed. Mr. Kreimer stated that Ms. James strongly supports the United States Trustee's motion to dismiss these cases with prejudice so that this debtor cannot avail himself of any automatic stay in a subsequent bankruptcy case, but she requests that the Court not grant Washington Mutual's request to annul the automatic stay. At the hearing, counsel for Washington Mutual urged the Court to grant its motion to annul the stay. The record does not reflect any pleadings having been filed by Washington Mutual in response to papers filed by the debtor in Case No. 05-95809 on October 3, 2005, nor has Washington Mutual filed any pleadings with respect to the United States Trustee's motions to dismiss.

Considering all the facts and circumstances, the Court concludes that the automatic stay should not be annulled, but both Case No. 05-95809 and Case No. 05-96715 should be and are hereby dismissed for cause and with prejudice pursuant to § 105(a), § 349, and § 1112(a) of the Bankruptcy Code. Debtor is prohibited from filing a bankruptcy petition for any relief under any chapter of Title 11 of the United States Code for a period of one year from the entry of this Order.

IT IS SO ORDERED, this _____ day of December, 2005.

_____
JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

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